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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974.

No. 74-891

EDGAR PAUL, CHIEF OF POLICE, LOUISVILLE DIVISION OF POLICE, AND RUSSELL McDANIEL, CHIEF OF POLICE JEFFERSON COUNTY DIVISION OF POLICE,

Petitioners,

vs.

EDWARD CHARLES DAVIS, III,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

MOTION FOR LEAVE TO FILE A BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE IN SUPPORT OF THE PETITIONER, OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC. AND THE KENTUCKY ASSOCIATION OF CHIEFS OF POLICE.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

MOTION FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE IN SUPPORT OF THE PETITIONER.

Americans for Effective Law Enforcement, Inc. and the Kentucky Association of Chiefs of Police respectfully move this Court for leave to file a brief, *amici curiae,* in support of the petitioner in the instant case. This motion is made pursuant to Rule 42 of the Supreme Court Rules. The petitioner has consented to our filing; the respondent has not responded to our request for consent to file. Accordingly, we are moving the Court directly for leave to file. A letter from counsel for the petitioner has been filed with the Clerk of this Court. The interest of the *amici curiae* and our reasons for desiring to file are set forth below.

INTEREST OF AMICUS CURIAE.

Americans for Effective Law Enforcement, Inc. (AELE) is a national not-for-profit citizens organization incorporated under the laws of the State of Illinois. As stated in its by-laws the purposes of AELE are:

1. To explore and consider the needs and requirements for the effective enforcement of the criminal law.
2. To inform the public of these needs and requirements, to the end that the courts will administer justice based upon a due concern for the general welfare and security of the law abiding citizens.
3. To assist the police, the prosecution, and the courts in promoting a more effective and fairer administration of the criminal law.

In furtherance of these objectives, AELE seeks to represent in our courts, nationwide, the concern of the average citizen with the problems of crime and of police effectiveness to deal with crime.

The Kentucky Association of Chiefs of Police (KACP), was founded in 1972. It is an unincorporated, not-for-profit professional association, and represents 120 chiefs of Kentucky Police departments. The KACP serves the law enforcement community and the public interest by advancing the art of professional police service. Its aims are to foster police cooperation and the exchange of information and experience among police administrators throughout the world, and to encourage adherence of all police officers to high professional standards of performance and conduct.

The interests of *amici* in the instant case stem from the importance of the issue involved, the resolution of which will have a direct and material impact upon the effectiveness of law enforcement nationwide. The issue in this case to which *amici* address themselves is that of the limited dissemination of criminal justice information by law enforcement agencies to merchants

and private security professionals in the interests of crime prevention even though respondent in the instant case had not been convicted of the offense for which he had been arrested. The holding of the court below, if sustained, that such dissemination rises to the level of a violation of the constitutional right to due process rather than that of a common law tort, to be determined on its merits by a state court, could seriously hamper crime prevention efforts of law enforcement agencies and, as a consequence, is of extreme importance to law enforcement nationwide.

Therefore *amici* respectfully move this Court for leave to file this brief.

Respectfully submitted,

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BRIEF AMICUS CURIAE IN SUPPORT OF THE PETITION.

ARGUMENT.

I.

IMPORTANT PRACTICAL POLICY CONSIDERATIONS MILITATE AGAINST THE ELEVATION OF THE COMMON LAW TORTS OF DEFAMATION AND/OR INVASION OF PRIVACY TO FEDERALLY PROTECTED CONSTITUTIONAL RIGHTS UNDER TITLE 42 SECTION 1983.

Amici will not reiterate the legal arguments made in the brief of the petitioner although we agree with them and wish to associate ourselves with them. We will, rather, in this brief, ad-

dress ourselves to the important policy considerations which are embodied in the instant case, considerations which we believe are of the utmost importance insofar as the effectiveness of law enforcement is concerned. We believe that this Court's decision in the instant case, should the decision of the United States Court of Appeals for the Sixth Circuit be sustained, will have an impact upon law enforcement which will far transcend the rather narrow factual situation involved.

The Circuit Court of Appeals below has elevated the common law tort of defamation to that of a federally protected constitutional right, enforceable under 42 U. S. C. § 1983 in federal courts. We recognize the fact that this Court has held that a federally protected right of privacy exists in certain *narrowly limited* instances, *Griswald* v. *Connecticut*, 381 U. S. 479 (1965); *Katz* v. *United States*, 389 U. S. 347 (1967). This Court has never held, however, that a constitutional right of privacy is enforceable in federal courts arising out of the common law tort of defamation. In fact there is considerable authority from lower federal courts that allegations of defamation do not rise to a constitutional level; *Baker* v. *Howard*, 419 F. 2d 376 (9th Cir. 1969); *Jervey* v. *Martin*, 336 F. Supp. 1350 (W. D. Va. 1972); *Travers* v. *Paton*, 261 F. Supp. 110 (D. C. Conn. 1966).

We agree with the petitioner that simple defamation cases should not be elevated by this court to federally protected rights under Title 42 U. S. C. Section 1983. We advance the following policy reasons in support of this contention.

A. There Was in the Instant Case a Legitimate Purpose for the Dissemination of Respondent's Photograph.

Before this Court takes the step of elevating what heretofore was considered to be a common law tort to a federally protected right, it is necessary to examine the purpose for which the alleged misconduct on the part of the defendant police chiefs took place.

The dissemination made in this case was, we submit, made for a totally legitimate purpose, that of making merchants in the Louisville area, and their security personnel, aware of those who had been arrested for shoplifting during the past year. The dissemination was limited to merchants and their security people in an attempt to enable them to watch for known shoplifters.

Shoplifting is a major problem in this country among retail stores. The United States Department of Commerce has estimated that losses to business establishments were 5.21 billion dollars in 1973 and 5.77 billion dollars in 1974. Of these amounts shoplifting was the leading source of business crime at 28%.[1] Regarding the proliferation of shoplifting, the report continued:

> *About four million shoplifters are apprehended each year. It is estimated that only one of every 35 shoplifters is caught. This would indicate that about 140 million instances of shoplifting occur every year. In a study conducted by a major security service firm, 500 shoppers were followed at random in a New York City department store. Forty-two, or one of every twelve, was observed stealing some item during their visit to the store.*[2]

The *Uniform Crime Reports* of the Federal Bureau of Investigation report that shoplifting crimes rose 67% between 1968 and 1973.[3]

Against this background, we submit that the efforts of the Louisville and Jefferson County Police Departments to alert the merchants of the community were clearly legitimate.

The Court of Appeals below was apparently concerned over the fact that respondent had merely been *arrested* for shoplifting, but not convicted. We readily concede that the mere

1. "The Cost of Crimes Against Business," U. S. Dept. of Commerce, Domestic and International Business Administration, Bureau of Domestic Commerce, Washington, D. C. 1974, pp. 17, 18.

2. *Ibid.*, pp. 17, 18.

3. Kelley, "Crime in the United States, 1973," *Uniform Crime Reports*, Federal Bureau of Investigation, Washington, D. C. 1973.

fact of an arrest by itself, is of less probative value than a conviction; however, the fact of an arrest is far from being of no value whatsoever. This is especially true in the case of store security personnel and retail merchants who routinely, as a part of their duties, effect searches and arrests of suspected shoplifters based on probable cause. Not every movement of a shoplifter is open and notorious; furtive motions, erratic behavior and suspicious bulges in a suspect's clothing may form the totality of observations by a security officer or merchant. When these surveillances are coupled with knowledge that the suspect has been recently arrested for shoplifting, the composite information may constitute probable cause to justify detention, questioning, a limited search or an actual arrest. Neither a record of arrests nor inconclusive observations, *by themselves,* would justify a Fourth Amendment intrusion but in combination they may well constitute probable cause.

Although a prior arrest for an offense cannot alone support a finding of probable cause for a subsequent arrest or search, this does not mean that information is irrelevant. *LeDent* v. *Wolff,* 334 F. Supp. 64, 70 (D. Neb. 1971), vac. other grds., 460 F. 2d 1001 (1972). As stated in 28 *Corpus Juris Secundum* (with reference to drugs and narcotics, but which we believe to be analogous here):

> *Matters which may be taken into account in determining whether probable cause exists for issuance of a search warrant include the past criminal record of the suspected person, his association with known narcotic users, and the fact that accused is a known user of drugs. The fact that accused has previously been charged with possession of drugs in a separate incident is not sufficient, standing alone, to show probable cause for issuance of a search warrant; but such fact is entitled to some weight when viewed with other factual allegations in an affidavit upon the basis of which a search warrant is sought.*[4]

4. 28 C. J. S., *Drugs and Narcotics,* § 134.

Since the standard upon which a finding of probable cause supportive of a search warrant is the same standard used in judging warrantless arrests an searches, it follows that information relating to recent arrests for the same crime is a relevant element in the legality of a subsequent arrest or search. Probable cause determinations are based on *all* of the facts and circumstances taken as a whole, known to the officer, at the time of the arrest or search. Otherwise inadmissible evidence, especially hearsay, is both admissible and relevant to the issue of probable cause in any suppression hearing and civil suit for false arrest or imprisonment.[5]

Speaking for two other justices in *United States* v. *Harris,* 403 U. S. 582-83, 91 S. Ct. 2081-82 (1971), the Chief Justice stated that knowledge of a suspect's reputation was not irrelevant when supported, in the affidavit, by other information, citing *Brinegar* v. *United States,* 338 U. S. 160, 174; 69 S. Ct. 1302; 1310 (1974). Continuing the Chief Justice said:

> *We cannot conclude that a policemen's knowledge of a suspect's reputation—something that policemen frequently know and a factor that impressed such a 'legal technician' as Mr. Justice Frankfurter—is not a 'practical consideration of everyday life' upon which an officer (or magistrate) may properly rely in assessing the reliability of an informant's tip.*

Amici submit that there is a legitimate need to disseminate shoplifting arrest data to store security personnel and retail merchants. This compelling governmental interest must be weighed against any intrusions upon an individual's rights to privacy. In the case at bar, the distribution was made to private "peace officers" and merchants who exercise peace officer

5. See, in general, Annotation, *Propriety of Considering Hearsay or Other Incompetent Evidence in Establishing Probable Cause for Issuance of Search Warrant,* 10 A. L. R. 3d 359.

functions in enforcing a state statute, K. R. S. § 433.236.[6] *Amici* believe that a restricted dissemination of arrest record information to those persons who have a legitimate right and *need* to know such data is a reasonable and limited intrusion of a suspect's right to privacy, particularly in a case such as this in which it is sought to raise this right of privacy to a federal constitutional level.

B. The Opinion of the Sixth Circuit, Elevating the Tort of Defamation to a Violation of Federal Constitutional Rights, Could Impose an Intolerable Burden of Litigation Upon the Federal Courts and Upon the Police Nationwide.

1. *The Courts.*

It requires no extended citation of authority to make the point that our federal courts are experiencing enormous pressures from the burdens of litigation. The problems involved—crowded dockets, trial delays, unconscionable periods of time between the filing of cases and their resolution—have been recognized at every level of government.

The petitioners have stated in their petition for *certiorari* that:

> *To hold that the claim made by the Respondent in the case at bar amounts to a violation of his right to privacy as protected by the Constitution would open the proverbial*

6. The statute reads as follows:

433.236. Detention and arrest of shoplifting suspect. (1) A peace officer, security agent of a mercantile establishment, merchant or merchant's employee who has probable cause for believing that goods held for sale by the merchant have been unlawfully taken by a person, and that he can recover same by taking the person into custody, may, for the purpose of attempting to effect recovery, take the person into custody and detain him in a reasonable manner for a reasonable length of time. (2) Any peace officer may arrest without warrant any person he has probable cause for believing has committed larceny in retail or wholesale establishments. (Enact. Acts 1958, ch. 11, § 2; 1968, ch. 49, § 2.)

> *floodgates of litigation to virtually all types of tort actions sounding in defamation of character or invasion of privacy.*[7]

Amici believe that this is not in the slightest an overstatement of the situation. As evidence of this point we refer to a survey of police misconduct litigation taken in 1973 by the International Association of Chiefs of Police for Americans for Effective Law Enforcement, Inc., *amici* in this case.[8]

The survey showed that the number of such suits, filed in federal court, rose from an estimated 234 in 1967 to *an estimated 967* in 1971.

The opinion of the lower court, sustained in this appeal, would add to the list of allegations which could be made against the police that which they *said, wrote or disseminated.* This would place upon the federal courts, which should be the forum for redress of truly grievious violations of real constitutional rights,[9] the necessity for litigating, at the constitutional

7. Petition for a Writ of Certiorari, *Paul* v. *Davis*, No. 74-891 at page 12.

8. The survey was made of the 3,760 law enforcement agencies in this country which employed ten or more sworn officers. Data on the number of civil suits filed for police misconduct during the period 1967 to 1971 was requested by questionnaire. The survey sought data only on *misconduct* cases; therefore, suits involving motor vehicle claims, employment related actions and minor negligence matters was excluded.

1,604 law enforcement agencies employing 205,848 sworn officers replied to the questionnaires, a 42.7% response. Each questionnaire received was read over twice for obvious errors and wild scores. The results were key punched and verified. Several computer runs were made of gross scores and additional runs were made eliminating blank and zero responses.

Among the purposes of the survey was to obtain data, based both on actual responses received and computer projections of national totals of the numbers, *and increases* in the number of police misconduct cases filed in the five year period 1967-1971.

It is readily apparent that police misconduct suits in federal courts proliferated at an enormous rate during the survey period. Misconduct cases increased by 413; and these suits were those involving actual *misconduct* affirmative action by the police, perhaps taken in good faith, but affirmative conduct nevertheless.

9. See, e.g. *Monroe* v. *Pape*, 365 U. S. 167 (1961).

level, any number of cases which now sound in the torts of defamation and/or invasion of privacy.

If the manner in which police misconduct suits have proliferated in recent years, as indicated by the above mentioned survey, is any guide, the numbers of "defamation" and "privacy suits" newly elevated to a constitutional dimension would increase the burden on the federal courts manyfold.

We do not believe that the federal courts should be glutted with all types of tort claims which have historically been, and properly are, the province of the states.[10] *Only* those cases in which a deprivation of real constitutional rights is alleged or proved should be in the domain of the federal courts. The impact of such cases should not be diluted by providing that every allegation of a tortious act by a policeman is a federal case.

2. *The Holding by the Lower Court Is so Broad That Police Officials, Such As the Defendants in This Case, Would Be Unable to Know What Information They Could Use and Disseminate for Legitimate Law Enforcement Purposes.*

The ruling of the Court of Appeals below should be reversed because it is couched in such broad terms that the long range adverse effect of the ruling could be incalculable. The court below characterized the limited dissemination to local merchants of the names and pictures of known shoplifters, including respondent, by the defendant police chiefs as "branding" respondent with a "badge of disgrace,"[11] because he had not been convicted of the crime of shoplifting. It continued:

10. As this Court has stated:

> . . . the protection of a person's *general* right to privacy—his right to be left alone by other people—is like the protection of his property and his very life, left largely to the law of the individual states. *Katz* v. *United States*, 389 U. S. 347 (1967).

11. Petition for a Writ of Certiorari, *Paul* v. *Davis*, No. 74-891 at page 26.

> The harm is all the more apparent because the branding had been done by law enforcement officials with the full power, prestige and authority of their positions. There can be little doubt that a person's standing and association in the community have been damaged seriously when law enforcement officials brand him as an active shoplifter, accuse him of a continuing course of criminal conduct, group him with criminals and distribute his name and photograph to the merchants and businessmen of the community.[12]

This broad statement appears on its face to be a blanket prohibition against law enforcement officials, at the risk of liability for violation of federal constitutional rights, from making any dissemination of criminal justice information, which did not result in a conviction, to selected members of the community, no matter how relevant the information and no matter how legitimate the purpose of the dissemination.

In fact, we submit that the cited language of the lower court is sufficiently broad in its scope as to raise the possibility that it could be interpreted to prohibit the dissemination of non-conviction information even among law enforcement agencies themselves. For the prohibition imposed against dissemination by law enforcement officials to the merchants for the totally legitimate purpose of helping them prevent shoplifting and to identify and apprehend shoplifters could, by extension, be held to prohibit such a dissemination from one police department to another for an equally legitimate purpose: the identification and apprehension of other criminals.

Such a state of events would be disastrous to the effectiveness of law enforcement. Courts have long recognized the need for the maintenance and exchange of information among criminal justice agencies, *Laird* v. *Tatum*, 408 U. S. 1 (1972); *Fifth Avenue Peace Parade Committee* v. *Graf*, 480 F. 2d 326 (2d Cir. 1973), Cert. den., sub. nom. *Fifth Avenue Peace Parade Committee* v. *Kelley*, 94 S. Ct. 1469 (1974). In the latter case

12. *Ibid.* at p. 27.

the court upheld dissemination of intelligence information by the FBI to law enforcement agencies saying that:

> . . . the distribution here . . . was appropriate in view of the responsibility of the various official agencies made privy to the reports. 480 F. 2d at 333.

See also: *Rogers* v. *Slaughter*, 469 F. 2d 1084 (5th Cir. 1972); *Herschel* v. *Dyra*, 365 F. 2d 17 (7th Cir. 1966).

The opinion of the court below could cast the gravest doubt as to the continued ability of law enforcement agencies to retain and disseminate non-conviction information because of the risk of federal civil liability under the "branding" theory enunciated by the lower court.

Even if the lower court opinion is to be interpreted more narrowly, that is, that it applies only to dissemination of non-conviction information by law enforcement agencies to selected members of the community, the decision would still have an adverse effect upon the law enforcement picture generally.

There are members of the community who, while they are not public law enforcement officers themselves, have a very real and legitimate need to know if criminally inclined individuals are encroaching upon their sphere of activity. The instant case is a case in point. As was discussed in subsection A of this argument, the problem of shoplifting has reached such proportions for merchants and their security personnel that it is absolutely essential that they be made aware of the identity of potential shoplifters and the obvious persons to make them so aware are law enforcement agencies.

Other examples of instances in which selected individuals in various areas of activity need to receive criminal justice information from law enforcement officers include:

1. race track security officials in cases of known gambling offenders or organized crime figures;

2. hospital or pharmacy security officials in cases of known drug offenders;

3. securities brokers and bank security officials in cases of known stock fraud operators or embezzlers;

4. school security officials in cases of known sex offenders or child molesters;

5. security officials of public utilities such as gas, light, power and telephone companies, whose employees are credentialed to enter people's homes in cases of known burglars, robbers or rapists.

This listing is not exhaustive but it does present a picture of the very real necessity of a limited exchange of information between law enforcement officials and segments of the public. Finally, the point was made in the lower court opinion that since the respondent had not been convicted, the dissemination of the information in the instant case flies in the face of the presumption of innocence. Reasonable men do not quarrel with this presumption but it must be borne in mind that it *is* only a presumption.

In an ideal criminal justice system wherein each criminal proceeding resulted in the determination of the real truth as to the guilt or innocence of the accused, a rule of "no-dissemination-without-a-conviction" might be eminently sensible. Unfortunately, the criminal justice system in the United States bears no resemblance to such an ideal system. The fact of the matter is that in many instances the truth as to the actual or apparent guilt of a suspect in our system is for one reason or another suppressed.

For example, a person arrested for a crime whose guilt is at least highly probable may escape conviction because:

1. Physical evidence against him must, under the Exclusionary Rule, be suppressed. A suspected murderer found in possession of the murder weapon; a suspected rapist found in possession of the victim's bloody underclothing; an alleged robber or burglar found in possession of the fruits of the crime; or suspected heroin dealer found in possession of heroin all may

have to be freed because the items found must be suppressed if the police, in searching for or seizing such evidence, are found to have violated his Fourth Amendment rights in any manner.

2. Confessions made by the perpetrators of crimes—often the only evidence of their guilt—must be suppressed if the police, in obtaining the confession, ran afoul of the extremely rigid requirements involving the admissibility of confessions in the decision of the United States Supreme Court in *Miranda* v. *Arizona*, 384 U. S. 436 (1966).

3. Witnesses, and often victims, refuse to testify against the accused because:

(a) they are terrified into silence

(b) they are killed

(c) they are discouraged by the interminable delays involved in bringing an accused to trial.

(d) in such crimes as rape and molestation cases, the victims refuse to expose themselves and their family to the trauma of going through with a criminal prosecution.

4. Individuals are freed on such grounds as insanity, "Dimished capacity" etc.

These are but a few examples of the manner in which, while the suspect has not been in fact convicted, the practical realities of the situation dictate that his guilt is at least as likely as his innocence. Thus, the lower court's apparent prohibition, under the threat of federal civil liability, of *any* dissemination of non-conviction information by law enforcement agencies to those who have need for such information is sustained would have an obvious adverse impact on the criminal justice system.

CONCLUSION.

We do not call, in this brief, for a sort of carte blanche immunity for law enforcement agencies and individuals to make public disclosures of sensitive information about citizens whenever it pleases them. We do believe that in the instant case the limited dissemination was justified, that the police should not be prohibited from making such limited disseminations, that the decision of the court below is far too broad and that its adverse impact on law enforcement and the protection of society is totally out of proportion to any protection of individual rights involved, and that the policy considerations raised herein militate against the elevation of the common law torts of defamation and/or invasion of privacy to a federally protected constitutional right under 42 U. S. C. § 1983.

For these reasons we respectfully urge the Court to reverse the decision of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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